UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASCADES CONTAINERBOARD PACKAGING-LANCASTER, A DIVISION OF CASCADES NEW YORK, INC.

and

Case No. 03-CA-210207

GRAPHIC COMMUNICATIONS CONFERENCE/ INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 503-M

REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE ON BEHALF OF RESPONDENT CASCADES CONTAINERBOARD PACAKGING-LANCASTER, A DIVISION OF CASCADES NEW YORK, INC.

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INTRODUCTION

Respondent Cascades Containerboard Packaging-Lancaster, A Division of Cascades New York, Inc. ("Cascades") submits this Reply Brief in response to the Counsel for the General Counsel's ("GC") Answering Brief ("GC Br.") to Cascades's Exceptions, served February 5, 2019, and in further support of Cascades's Exceptions and Brief in Support of its Exceptions to the November 23, 2018 Decision of Administrative Law Judge Kimberly Sorg-Graves ("ALJ").

ARGUMENT

I. THE GC'S BRIEF INCORRECTLY PERPETAUTES THE BELIEF THAT *KRAVIS* IS APPLICABLE TO THE INSTANT CASE, DESPITE THE UNQUESTIONABLE DIFFERENCES DISTINGUISHING *KRAVIS*

The GC's Brief quotes self-serving language from *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143 (2007) and *NLRB v. Financial Institution Employees of America, Local 1182, Chartered by United Food and Commercial Workers International Union, AFL-CIO et al. (Seattle-First National Bank)*, 475 U.S. 192 (1986).[1] The quoted language relied upon by the GC presupposes that Local 503 is the lawful successor to Local 27 and that these cited cases are analogous to the instant case. As we previously demonstrated, the instant case is simply not comparable to *Kravis* and *Seattle-First*, and the Board should review the ALJ's decision as the facts herein demonstrate a matter of first impression necessitating Board review.

Kravis (a merger case) and *Seattle-First* (an affiliation case) inarguably concern different union transactions than what occurred here. The Supreme Court in *Seattle-First* examined a question concerning continuity of representation in the context of a union affiliation. In its decision, the Supreme Court remarked, "an affiliation does not create a new organization, *nor*

[1] The GC's Brief quotes *Seattle-First*, stating, "the Supreme Court determined that an employer could not use a perceived defect in a union's change in affiliation to excuse its bargaining obligation where 'the union succeeds the organization the employees chose, the employees have made no effort to decertify the union, and the employer presents no evidence to challenger the union's majority status.'" (GC Br. 2).

does it result in the dissolution of an already existing organization." *Seattle-First*, 475 U.S. at 206 (citing *Amoco Production Co.*, 239 NLRB 1195 (1979)) (emphasis added). *Seattle-First* examined a union affiliation and not a dissolution, as in the case at bar. The NLRB considers an affiliation to be when one union aligns or associates with a new union such that the alignment or association does not result in the dissolution of an already existing union. *See Exchange Bank*, 264 NLRB 822, 823 n.10 (1982) (internal citations omitted) (emphasis added); *see also Providence Medical Center*, 243 NLRB 714, 714 (1979). In other words, the *Seattle-First* decision hinges on the fact that an affiliation does not dissolve an existing union, and thus that decision, nor the subsequent decision in *Kravis*, applies here.

The GC has regularly failed to recognize an obvious distinction between *Kravis* and the instant case throughout the pendency of this matter.[2] *Kravis* involved six local unions that merged into one brand new local union. Generally, in the context of a union merger where multiple local unions merge to create a new entity, each of the former local unions maintains a defined unit in the newly created larger local. *See Deposit Telephone Company, Inc.*, 349 NLRB 214, 222 (2007). Prior to the merger in *Kravis*, the business agent for the original local union negotiated contracts, handled grievances and serviced unit members. *Kravis*, 351 NLRB at 148. Following the creation of the brand new local union, the business agent of the original local union maintained a major role with the newly created local union by assisting with the administration and running of the newly created local union. *Id.* at 160. Thus, a piece of the original local that merged in *Kravis* to create a new entity survived the merger process. Despite the GC's attempts to gloss over this unquestionable distinction, the Board must recognize the

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[2] The GC's attempt to strategically quote the phrase "ceasing to exist" from *Kravis* is disingenuous. Following a merger, it is indisputable that the original local union ceases to exist in name; an international union creates an entirely new entity that exists under a newly created name. As set forth below, the newly created local union in *Kravis* still maintained key representational features from the original local union. This did not occur in the instant case.

clear difference that separates *Kravis* and the instant case and makes reliance on *Kravis* improper.

The GC admits that what occurred here is neither a merger (like *Kravis*) nor an affiliation (like *Seattle-First*) – it is an administrative transfer. (GC Br. 4). Thus, the Board must not evaluate the facts herein within the parameters of *Kravis*. Not a single precedential Board case exists where a larger local union created a five-year trusteeship to establish "continuity" so it could administratively transfer the representational rights of employees from their originally bargained for local union into a larger local union, in turn completely dissolving any remnants of the original local union voted for by the employees. Here, Stafford and the international union dissolved all remnants of Local 27 that existed prior to the trusteeship in 2012 when it performed the administrative transfer of Local 27 into Local 503. No Local 27 business agents remained – rather, all were relieved of their duties in 2012. The Local 27 representatives that bargained contracts and processed employee grievances prior to the trusteeship did not maintain a role in Local 503. Local 27 did not become a part of a newly created local union following a merger – rather, the international union forcibly transferred it into an already existing union (i.e., Local 503) without any concern for the members of Local 27.

What occurred between Local 27 and Local 503 is not analogous to *Kravis*, *Seattle-First*, or any other case ever heard by the Board.[3] The issues at hand are ripe for Board review and necessary to guard against the domination of employee free choice by power hungry unions that possess unrestricted abilities to transfer representational rights without interference.

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[3] Even if the Board believes *Kravis* is analogous to the instant case, which it is not, the Board should overturn its holding in *Kravis* and reinstitute due process safeguards that allow employees to have a voice (the same voice used to elect a bargaining representative initially) when unions' unilaterally decide to transfer employee representational rights. The Board should not continue to endorse a union's ability to transfer representational rights without employees having a say in the transaction. The result becomes employees forced to accept a new union as their representative, despite it not being the union voted for by the employees. The National Labor Relations Act (the "Act") provides for employees to freely select their bargaining representative and *Kravis* strips them of their statutory right.

II. THE BOARD'S DECISION IN *QUALITY INN WAIKIKI* REMAINS DIRECTLY ON POINT AND REQUIRES THE EVALUATION OF CONTINUITY OF REPRESENTATION FROM THE TIME PERIOD PRIOR TO THE IMPLEMENTATION OF THE FIVE YEAR TRUSTEESHIP

In an attempt to distinguish *Quality Inn Waikiki*, 297 NLRB 497 (1989) because the holding cuts directly against the reasoning underlying the ALJ's decision, the GC claims that the "Board relied heavily on [employee dissatisfaction with their representation] in invalidating the internal union transfer" without citing to a single phrase in the *Waikiki* decision. This is a prime example of the GC mischaracterizing Board law in an effort to shift attention away from case law that runs contrary to the GC's desired outcome in the instant case. Unsurprisingly, the GC fails to cite to the language stating, "what emerged from the trusteeship and subsequent merger and now seeks to continue to represent Respondent's employees . . . bears scant, if any resemblance to that which was certified as their bargaining representative." *Id.* at 503. Further, "in addition to the vast difference in size and the concomitant diminution of influence of former [original local union] members over the internal union affairs and policies of [the new larger local union] . . . the governing bylaws of the [original local were] initially suspended and subsequently superseded by that of [the new larger local union] . . . [and] none of the elected officers or executive board members of [the original local union] holds an elected or appointive official position in [the new larger local union]. *Id.* The original local union's offices were no longer used for union business and all assets of the original local union were transferred to the new local union, such that "by dint of the trusteeship and merger, an entirely different labor organization seems to have been substituted for the certified bargaining representative." *Id.* As previously discussed in our Brief in Support of Our Exceptions, these drastic changes in the representative because of the trusteeship are almost directly analogous to what occurred in the instant case.

With the exception of the suspension of the bylaws, *each of these circumstances applies to the case at hand.* As a result of the trusteeship, Local 27's executive members were dismissed (ALJ 3:27-4:1, Tr. 160); Mr. Stafford served as Local 27's business agent (Tr. 35, 161); Mr. Stafford conducted all collective bargaining and all grievance adjusting for the original local (ALJ 4:5-6, 25-27, Tr. 35); Mr. Stafford assumed control over all Local 27's assets, including its office equipment, files and bank accounts (ALJ 4:1-4, Tr. 197-198); and, Mr. Stafford closed Local 27's offices, and moved Local 27's operations to the existing Local 503 office (ALJ 4:2-3, 36-37, Tr. 161). *Waikiki* is directly on point and should heavily guide the Board's review of the instant case. When properly considered by the Board, *Waikiki* represents the proposition that the appropriate time to evaluate continuity is between the pre-trusteeship local union and the post-administrative transfer local union.

If properly evaluated by comparing Local 27 during the pre-trusteeship period and the resultant Local 503 after the purported administrative transfer, it must follow that continuity does not exist between the two locals. The ALJ's evaluation of the incorrect continuity period alters the entire outcome of her decision. Even the GC's Brief analyzes several continuity factors that only purport to show continuity if comparing the trusted Local 27 in 2017 to the post-administrative transfer Local 503 in 2017.[4] (GC Br. 8-9). If the Board compared these same factors between the pre-trusteeship Local 27 in 2012 and the post-administrative transfer Local 503, absolutely no continuity would exist.[5]

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[4] In attempting to establish continuity, the GC incorrectly claims, "there are no plans to alter those dues payments." (GC Br. 9). However, Local 503's dues are higher than those charged by Local 27, and Mr. Stafford admitted that Local 503 intends to require the now-former Local 27 members to pay Local 503's higher dues rate. (ALJ 5:27-30, Tr. 220).

[5] As stated in our Brief in Support of Our Exceptions, Cascades fully believed that the purpose of the Local 27 trusteeship was to rehabilitate Local 27 to allow it to continue operating in the future. The record contains no evidence that Cascades knew or had any reason to believe that a 5-year trusteeship would ensue and the International would entirely dissolve Local 27.

III. THE GC UNDERSTANDABLY FAILS TO REBUT CASCADES'S ARGUMENT THAT THE ALJ'S DECISION ALLOWS UNIONS TO CREATE FAUX CONTINUITY OF REPRESENTATION AND TRANSFER EMPLOYEE REPRESENTATIONAL RIGHTS WITHOUT OPPOSITION

Curiously, the GC makes no effort to address Cascades's argument regarding a union's ability to manufacture continuity of representation unilaterally, allowing it to transfer employees' representational rights without any recourse for the employees. The GC's failure to address the manufactured continuity issue is completely understandable. If the Board affirms the ALJ's decision, it will gift unions an unchecked and immense instrument of power. A green light from the Board allowing unions to strip employees of who and what they bargained for by merely referring to a transaction as an "internal union process" would unquestionably score unions a remarkable victory. At any given time, this power would allow larger unions to claim a smaller local union suffers from "financial instability," install a trusteeship – like what occurred here – and create "continuity" over a period of several years. Once the larger union believes it has established "continuity" by maintaining a long enough trusteeship – with the understanding that the Board unbelievably does not provide for employee due process – it can "administratively transfer" the original, employee voted-upon union into a larger, unknown union because it is more convenient. This process destroys and fully disregards any employee considerations and leaves an employer powerless to help its employees – as the representative for which the employees actually bargained is abolished without any means of recourse.[6]

In sum, the Board should not allow unions to manufacture "continuity" unilaterally via trusteeship while simultaneously denying employees the right to participate in or object to a

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[6] The recent trend in Board decisions sets the issue in the instant case as ripe for Board review. In *Cablevision Systems Corp.*, 367 NLRB No. 59 (2018), the Board took a noticeable step towards ensuring employee free choice is preserved and due process is afforded to employees. *See id.* (overruling a Regional Director's refusal to reinstate a timely filed decertification petition blocked by pending unfair labor practice charges for more than three years, the Board determined that if it had not reinstated the petition and protected the right of employees to freely select their representative, the new collective bargaining agreement could potentially prevent a new petition from being processed until the end of the three year contract).

dissolution and administrative transfer of their bargaining rights. Doing so would abrogate the key purpose of the Act itself – the right for employees to choose their own bargaining representative. As we previously stated, the ALJ's misinterpretation of analogous case law, coupled with her reliance on inapposite case law, creates the need for the Board to repair these wrongs by dismissing the Complaint.

IV. THE GC'S BRIEF CONSISTENTLY RELIES UPON DISTINIGUISHABLE CASE LAW WHILE MISCHARACTERIZING BOARD LAW AND TESTIMONY

Throughout the GC's Brief, it regularly mischaracterizes Board law and testimony in the record in an effort to better support its position. Specifically:

- The GC claims a party seeking to avoid a bargaining obligation has a "heavy burden of establishing lack of continuity." (GC Br. 4, 7 n.11). The Board cites to *CPS Chemical Co.*, 324 NLRB 1018 (1997) and *Sullivan Bros. Printers*, 317 NLRB 561, 571 (1995). Neither case relied upon by the Board suggests a "heavy burden" exists.
- The GC endeavors to spin the lack of credibility displayed by Stafford when trying to answer questions regarding his failure to produce Local 27's bylaws as evidence that the record is "nearly silent as to the state of Local 27 prior to the trusteeship." (GC Br. 7 n.11). Despite Stafford's sworn affidavit indicating that he possessed the Local 27 bylaws, reviewed the bylaws and would produce the bylaws, he testified he could not recall what he provided to the GC. (Tr. 180-182). The GC quickly denied ever receiving the Local 27 bylaws. The GC's position that there is no evidence that the bylaws were "deliberately withheld" is wholly disingenuous. (GC Br. 11). One of the following must be true – either Stafford perjured himself in his sworn affidavit produced to the Board and in federal court that he ever had and reviewed the bylaws; or, Stafford is deliberately withholding the bylaws. If the former, the Board must reevaluate the ALJ's determination finding Stafford's testimony credible. If the

latter, the Board must draw an adverse inference that the Local 27 bylaws would reveal significant discontinuity with Local 503, inherently undermining the GC's entire continuity argument.

- The GC attempts to rely on *Defiance Hospital*, 330 NLRB 492 (2000) to support the ALJ's determination that the correct period to evaluate continuity is the period immediately before and after the purported April 1, 2017 administrative transfer. (GC Br. 5). First, the trusteeship was a mere 14 months in *Defiance Hospital*, not 5 years like in the instant case. Unlike what occurred here, the union in *Defiance Hospital* did not use the trusteeship as a means for establishing continuity of representation – as largely the same union leadership remained in place from before the trusteeship after the merger. Second, *Defiance Hospital* is an example of a merger between unions, which is not what took place between Local 27 and Local 503. Third, an employee vote occurred in *Defiance Hospital* and the result was 29-0 in favor of the merger. Here, no employee vote occurred, let alone a unanimous vote.
- The GC relies on *Sullivan Bros. Printing*, 317 NLRB 561 (1995) to justify the ALJ's improper decision to evaluate continuity between Local 27 and Local 503 at the time of the purported administrative transfer. *Sullivan Bros. Printing* does not contain a local union placed in a five-year trusteeship that vastly altered the identity of the original local union. The lack of a trusteeship altering continuity factors and the occurrence of a unit member vote, which provided due process safeguards to employees, separates *Sullivan Bros. Printing* from the instant case. Importantly, *Sullivan Bros. Printing* is the only published Board decision involving an "administrative transfer" of one local union into another – and employees had the ability to vote such that due process safeguards existed. There is <u>not one published Board case</u> involving an administrative transfer of one local into another that resulted in the complete

dissolution of the original local union where employees failed to receive due process protections. The facts herein present a matter of first impression that necessitate Board review.

- The GC strives to support the ALJ's reliance on *Sewell-Allen Star*, 294 NLRB 312 (1989), yet unsurprisingly omits nearly every fact underlying the Board's determination. The omitted facts clearly distinguish *Sewell-Allen Star* from the instant case. The merging union in *Sewell-Allen Star* sent a letter notifying the employer of the merger, and the employer responded acknowledging the merger and then dealt with the new merged union for 7 months before withdrawing recognition. *Id.* at 312. That is not what happened here. The GC is unable to do anything more than draw inappropriate and baseless conclusions that Cascades had knowledge of the administrative transfer and dissolution of Local 27 as early as April 1, 2017. (GC Br. 14-16). The record does not contain a scintilla of evidence that confirms Cascades knew of the dissolution of Local 27 until late-October 2017. Thus, Cascades timely decided on December 19, 2017 not to recognize Local 503 as the bargaining representative of the Local 27 members and thus, no Section 10(b) issue exists. As we previously stated, Cascades fully believed Local 27 would remain in existence following the trusteeship that it believed was set up to cure Local 27's purported financial difficulties.
- The GC inaccurately states that *Exxon Chemical*, 340 NLRB 357 (2003), *enfd.* 386 F.3d 1160 (D.C. Cir. 2004) is "right on point." (GC Br. 18). Further, the ALJ's reliance on *Exxon* is misguided. First, *Exxon Chemical* did not involve a union affiliation/merger/transfer like in the instant case – it concerned an employer forming a joint venture, thereby creating a new employer entity. Second, the employer's rationale for not agreeing to arbitrate the three grievances in *Exxon* did not stem from a question concerning continuity of representation. Rather, the employer in *Exxon* incorrectly claimed the grievances were untimely and covered by a settlement agreement between the union and the employer. Third, the grievances at issue

in *Exxon* affected the entire bargaining unit and related to different provisions of the collective bargaining agreement.[7] Cascades refused to arbitrate a single grievance brought by Local 503 because of the legitimate question concerning its status as the representative of the former Local 27 members. Moreover, the grievance at issue involved the reclassification of four shipping coordinators' job titles that led to them receiving a reduced wage rate. The grievance did not affect the entire bargaining unit and did not relate to different provisions of the collective bargaining agreement like in *Exxon*. Further, and importantly, the Board acknowledges another line of cases that stand for the proposition that if an employer's refusal to arbitrate is limited to a single grievance or specifically defined, 'narrow class' of grievances, Section 8(a)(5) is not violated. *Id.* at 359.

CONCLUSION

For all of the reasons detailed herein, and those set forth in Cascades's Brief in Support of Its Exceptions to the Decision of the ALJ, this case against Cascades should be dismissed.

Dated: February 19, 2019

Respectfully submitted,

JACKSON LEWIS P.C.

By: _____

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[7] Specifically, the grievances at issue in *Exxon* related to the employer not providing employees with the contractually required 6-month notice of layoff, the employer failing to match contributions to the employees' thrift fund based upon severance pay and the employer's unilateral decision to transfer its thrift fund to the new joint venture's thrift fund.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

CASCADES CONTAINERBOARD PACKAGING-LANCASTER, A DIVISION OF CASCADES NEW YORK, INC.

and

Case No. 03-CA-210207

GRAPHIC COMMUNICATIONS CONFERENCE/ INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 503-M

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February, 2019, I served a true copy of **REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE ON BEHALF OF RESPONDENT CASCADES CONTAINERBOARD PACAKGING-LANCASTER, A DIVISION OF CASCADES NEW YORK, INC.** *via* the National Labor Relations Board's electronic filing service and via electronic mail on:

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4838-6498-1896, v. 1